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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**CHART'S TRIAL BRIEF
REGARDING ITS OBJECTIONS TO
PLAINTIFFS' USE OF TRIAL
EXHIBITS 201, 223, 239, 147 AND 247
DURING DIRECT EXAMINATION OF
DR. JOSEPH CONAGHAN**

Judge: Hon. Jacqueline Scott Corley

1 Defendant Chart, Inc. (“Chart”), submits this Trial Brief regarding its objections to
 2 Plaintiffs’ use of certain Trial Exhibits during their direct examination of Dr. Joseph Conaghan
 3 on Wednesday, May 26, 2021, and in support states as follows:

4 On Monday, May 24, 2021, Plaintiffs’ counsel emailed Chart’s counsel a list of exhibits
 5 they intend to use during their direct examination of Dr. Conaghan, which included Trial
 6 Exhibits 201, 223, 239. Plaintiffs later emailed to notify of their intent to use Trial Exhibits 247
 7 and 147 as well. Chart objects to the use of these exhibits during direct examination of Dr.
 8 Conaghan under Federal Rules of Evidence 402, 403, and 602.

9 With respect to Trial Exhibits 201, 223 and 239 about other controllers, the Court
 10 previously overruled Chart’s objections and has permitted the exhibits, *e.g.*, for notice to Chart
 11 purposes.¹ However, that does not make these exhibits admissible for use with all witnesses in
 12 the case. These exhibits are multipage chains of emails from 2016 and 2017 between Chart
 13 employees or unidentified Chart customers or distributors. Dr. Conaghan is not part of the
 14 emails. Rather, he is PFC’s lab director, a lay witness who was never an employee of Chart,
 15 and otherwise has no personal knowledge of the content of these emails. Fed. R. Evid. 602 is
 16 clear: “A witness may testify to a matter only if evidence is introduced sufficient to support a
 17 finding that the witness has personal knowledge of the matter.” As a result, Dr. Conaghan
 18 cannot testify about these emails.

19 Turning to the Rule 402 and 403 objections if these exhibits are used with Dr.
 20 Conaghan, Trial Exhibit 223 illustrates the point. Plaintiffs’ counsel alluded multiple times in
 21 their opening statement to employee Brendan Wade’s email that “[w]e try not to call attention
 22 to the issue with the customer obviously,” as being somehow relevant to their claims. However,
 23 Mr. Wade’s email is not relevant to any of Plaintiffs’ strict liability claims predicated on an
 24 alleged weld-defect in Tank 4 or their negligent failure to recall claim predicated on an
 25 unspecified defect in the subject TEC3000. To be clear, purported evidence that Chart did not
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27 ¹ Chart preserves its previously lodged objections to these exhibits, which contain multiple levels
 28 of hearsay and discuss other occurrences Plaintiffs have not established to meet the “substantial
 similarity” test for admissibility. (*See* Dkt. Nos. 760 and 783.)

1 warn its customers (or the end-users) is not relevant to any of Plaintiffs' remaining claims,
2 which do not include a failure to warn claim. (*See, e.g.*, May 18, 2021 hearing transcript, at
3 29:5-30:21.) Thus, to the extent Plaintiffs attempt to use Exhibit 223, or the other emails in
4 Exhibits 201 and 239, to elicit testimony from Dr. Conaghan about Chart's purported lack of
5 warnings regarding issues with other TEC3000 controllers, or what Dr. Conaghan would have
6 supposedly done if PFC had been warned, such testimony is objectionable under Fed. R. Evid.
7 402 as irrelevant and Fed. R. Evid. 403 as confusing and unfairly prejudicial. In sum, Plaintiffs'
8 attempt to parade objectionable "other occurrence" e-mails in front of a PFC witness that has
9 absolutely no personal knowledge should be rejected.

10 As for Trial Exhibits 147 and 247, Plaintiffs notified Chart of their intention to use these
11 exhibits with Dr. Conaghan after expiration of the 48-hour rule (Ex. 147 was disclosed after 5
12 pm on Monday, May 24, and Ex. 247 was not disclosed until the middle of court proceedings on
13 Tuesday, May 25). On May 25, as a matter of professional courtesy, Chart informed Plaintiffs
14 that it would not object to those two exhibits as untimely (as Chart would expect Plaintiffs to
15 extend it that same courtesy). But Chart also informed Plaintiffs of substantive objections to
16 using Trial Exhibits 147 and 247 with Dr. Conaghan. Dr. Conaghan lacks personal knowledge
17 of Trial Exhibit 247 (*see* Fed. R. Evid. 602). Chart has also lodged an objection to Trial
18 Exhibits 147 and 247 based on Fed. R. Evid. 402 and 403 (confusion and misleading).

19 Chart will be prepared to address all of these exhibits with the Court in the morning.
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Respectfully submitted,

Dated: May 25, 2021

By: /s/Andrew A. Lothson

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